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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
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Calling Party Pays Service Offering in the Commercial Mobile Radio Services	)	WT Docket No. 97-207
	)	

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF BELLSOUTH CORPORATION

William B. Barfield
Jim O. Llewellyn
1155 Peachtree Street, NE, Suite 1800
Atlanta, GA 30309
(404) 249-4445

David G. Frolio
1133 21st Street, NW, Suite 900
Washington, DC 20036
(202) 463-4182

Its Attorneys

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SUMMARY

BellSouth does not oppose CPP, it opposes only *mandates* to provide the service or components thereof, including mandatory billing and collection by LECs. Not only is LEC mandated billing and collection for CPP unnecessary, there is no legal or policy basis upon which to predicate re-regulating LEC billing and collection in the context of CPP. Simply put, LEC ratepayers must not be made to bear the brunt of funding CPP, which the Commission has correctly found to be a CMRS service in this context. It is not what Congress had in mind; it is not what the FCC is empowered to do; and it is not in the public interest.

As a preliminary matter, the Commission's proposal to mandate the provision of CPP billing information by LECs pursuant to Section 251(c)(3) must be rejected, since it applies only to ILECs and does not address the provision of billing information by other non-ILECs whose customers originate CPP traffic. Any decision to apply mandatory billing and collection to ILECs alone would be arbitrary and capricious and constitute reversible error. Moreover, the Commission's attempt to use ancillary jurisdiction to regulate LEC billing and collection for CPP pursuant to Sections 4(i) and 303(r) is also unavailing, because doing so would be inconsistent with law, unnecessary, and contrary to precedent:

- First, the exercise of ancillary jurisdiction is contrary to Section 332, which expressly reserves to the states — not the Commission — the authority to regulate the "other terms and conditions" of CMRS services, including "customer billing information and practices and other billing disputes." Given Congress' express reservation of billing issues to the states, any attempt by the Commission to use ancillary jurisdiction to regulate LEC billing and collection for CPP would be inconsistent with Section 332.

- Second, FCC regulation of LEC billing and collection services for CPP is wholly unnecessary. CMRS competition is expanding, prices for wireless service are falling, MOUs are increasing, and "first-minute free" and one-rate "basket of minutes" service plans are being offered — all in the absence of widespread availability of CPP. As a result, CPP is likely to be a niche service, at most. Alternative methods are also available to allow CPP billing and collection to be conducted by the CMRS carrier.

- And third, the exercise of ancillary jurisdiction is contrary to precedent. For example, in 1986, the Commission detariffed billing and collection services provided by LECs to unaffiliated IXCs, finding the regulation of such services to be unnecessary given the competitive market. More recently, the Commission declined to require BOCs to provide billing and collection services to enhanced service providers, emphasizing that ESPs are able to bill their own subscribers without FCC mandates.

Not only is the Commission without jurisdiction to mandate LEC billing and collection for CPP, however, doing so could impose significant and unjustified costs on LECs and their ratepayers. These costs cannot be justified. There is no compelling record that CPP is so necessary — and LEC

involvement so critical — that LECs should be required to provide billing and collection services, which are otherwise available in the competitive market. Nor has there has been any showing that CPP rises to the level of E-911, universal service, or number portability in the highly competitive CMRS marketplace. BellSouth strongly opposes any additional unfunded mandates, particularly when there is no compelling public interest reason for doing so.

The *Notice* also seeks comment on whether regulatory intervention is necessary to protect a calling party against excessive rates charged by a CMRS carrier to complete a CPP call. At this point, any regulatory intervention is premature, given the fact that there is no evidence that CPP pricing will in fact be problematic if CPP is implemented in the United States. Accordingly, BellSouth supports the Commission's tentative conclusion to defer regulatory intervention until there is clear evidence that intervention is necessary to resolve rate issues.

Finally, BellSouth believes that the Commission's *Notice* may have overstated some of the potential benefits of CPP, and placed undue reliance upon the international model. For example, the *Notice* downplays the fact that wireline customers may object to the idea of having to pay an additional cost to reach a mobile user, and also ignores the impact of CPP upon low-volume and low-income *wireline* consumers who may not be able to afford additional charges to complete calls to CPP customers. Reliance upon the international success of CPP in Europe and Latin America is misplaced; while many countries have established very successful CPP services that are appropriately implemented for their regulatory environment, they are different in many respects from CPP contemplated in the United States.

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COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation ("BellSouth"), by its attorneys, hereby submits these comments in response to the Commission's *Notice of Proposed Rulemaking*, WT Docket No. 97-207, FCC 99-137 (rel. July 7, 1999), *summarized*, 64 Fed. Reg. 38396 (July 16, 1999) (*Notice*).[1] The *Notice* seeks comment on Commission proposals concerning "calling party pays" ("CPP"), pursuant to which a commercial mobile radio service ("CMRS") provider makes available to its subscribers "an offering whereby the party placing the call to a CMRS subscriber pays at least some of the charges associated with terminating the call, including most prominently charges for CMRS airtime."[2]

These comments address CPP in the highly competitive United States environment and do not necessarily apply to other countries where conditions are significantly different. Many countries have established very successful CPP services that are appropriately implemented for their regulatory characteristics, yet are different in many respects from CPP contemplated in the United States.

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[1]The Commission simultaneously released a *Declaratory Ruling*, WT Docket No. 97-207, FCC 99-137 (rel. July 7, 1999), *summarized*, 64 Fed. Reg. 38313 (July 16, 1999) (*Declaratory Ruling*).

[2]*Notice* at ¶ 2.

BellSouth does not oppose CPP, it opposes only *mandates* to provide the service or components thereof, including mandatory billing and collection by local exchange carriers ("LECs"). Not only is there no legal or policy basis upon which to justify mandating LEC provision of billing and collection for CPP, it is also contrary to the public interest for LEC ratepayers to subsidize the costs of this niche CMRS service. Simply put, there are too many unresolved technical issues involving CPP for the Commission to release a billing and collection mandate on LECs at this time. The FCC should let the market guide the demand and availability of CPP, without resorting to unjustified and unfunded mandates.

I. THERE IS NO LEGAL OR POLICY BASIS TO REQUIRE LEC BILLING AND COLLECTION FOR CMRS CPP

The Commission has asked for comment on the need for Commission regulation of LEC billing and collection services, and the legal basis for such action.[3] This request is based upon suggestions in the record that CPP cannot be offered effectively on a nationwide basis unless billing and collection services can be obtained from the LEC that serves the calling party.[4] As shown below, not only is LEC mandated billing and collection for CPP unnecessary, there is no legal or policy basis upon which to predicate re-regulating LEC billing and collection in the context of CPP. Given the existence of competitive alternatives, such as third-party clearinghouses, the Commission should not engage in re-regulation, but should let the marketplace decide the resolution of billing and collection issues. The FCC should not make LECs the "biller of last resort;" it is not what Congress had in mind; it is not what the FCC is empowered to do; and it is not in the public interest.

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[3] *Notice* at ¶ 28.

[4] *See Notice* at ¶ 28 (citing AirTouch Comments to NOI at 17-18; Omnipoint Comments to NOI at 7).

A. Section 251(c)(3) Is Unavailing

The Commission seeks comment on whether it has jurisdiction to order incumbent LECs ("ILECs") to provide billing information to others (such as the CMRS provider, a credit card company, or a clearinghouse) for such parties to perform billing and collection. Under this theory of jurisdiction, billing information would constitute a "network element" to be unbundled (an "unbundled network element," or "UNE") subject to Section 251(c)(3) of the Communications Act ("the Act"),[5] because the definition of "network element" in Section 3(29) of the Act includes a reference to "information sufficient for billing and collection."[6] The Commission also inquires as to its jurisdiction to impose similar requirements with respect to CPP-related billing information on non-incumbent LECs, such as competitive LECs ("CLECs"), LECs serving rural areas, and wireless carriers, who are not subject to Section 251(c)(3).

Whether the provision of billing information can be considered a UNE is ultimately irrelevant, because as the Commission recognizes, Section 251(c) applies only to ILECs and does not address the provision of billing information by other non-ILECs whose customers originate CPP traffic.[7] With the growth of CLECs and wireless carriers, an increasing percentage of calls to wireless phones potentiality subject to CPP can be expected to originate through such non-ILEC carriers. In each case, each of the originating carriers are identically situated with regard to the CPP call, and all must be treated alike as far as any billing and collection obligation is concerned. Any decision to apply mandatory billing and collection to ILECs alone would be arbitrary and capricious

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[5]47 U.S.C. § 251(c)(3).

[6]47 U.S.C. § 153(29).

[7]*See* 47 U.S.C. § 251(c).

and constitute reversible error.[8] Thus, Section 251(c)(3) must be rejected as a basis to mandate the provision of CPP billing and collection by originating carriers.

Accordingly, the only way to mandate the provision of billing information by wireless carriers, CLECs and ILECs alike is by exercising ancillary jurisdiction which, as shown below, is without basis and contrary to law.

B. Sections 4(i) and 303(r) Are Unavailing

Since Section 251(c)(3) is ultimately unavailing to provide the Commission with jurisdiction to mandate the provision of information for billing and collection by *all* originating carriers, the Commission must look to its ancillary jurisdiction under Sections 4(i) and 303(r) in Title I of the Act[9] for possible authority.[10] Under Section 4(i), the Commission is directed to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[11] Similarly, Section 303(r) enables the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act."[12]

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[8] *See* 5 U.S.C. § 706(2)(A).

[9] *See* 47 U.S.C. §§ 154(i), 303(r).

[10] *See Notice* at ¶65.

[11] 47 U.S.C. § 154(i).

[12] 47 U.S.C. § 303(r).

While the Commission has broad powers under these provisions, the exercise of ancillary jurisdiction is "not infinitely elastic"[13] and courts have warned against the "talismanic invocation of the Commission's Title I authority."[14] The D.C. Circuit, for example, has recently taken a limited view of ancillary jurisdiction, noting that Section 4(i) "provides the Commission no independent substantive authority."[15] Rather, jurisdiction must be limited to those activities that are "reasonably ancillary" to the performance of the Commission's various responsibilities.[16] In order to be reasonably ancillary, the Commission must show that the exercise of Title I jurisdiction is "necessary in the execution of its functions as described under other provisions of the Act, while not contravening any other provisions."[17]

Thus, under the clear language of the statute, in order for the Commission to exercise ancillary jurisdiction under Title I, Sections 4(i) and 303(r), it must demonstrate (1) that the exercise of such jurisdiction is "not inconsistent" with the Act or otherwise inconsistent with law, *and* (2) that the exercise of such jurisdiction is "necessary." As shown below, neither of these components of the ancillary jurisdiction test are satisfied in the case of LEC provision of CMRS CPP billing and collection.

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[13]*North American Telecommunications Association v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985).

[14]*California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990).

[15]*Southwestern Bell Telephone Co. v. FCC,* 168 F.3d 1344, 1350 (D.C. Cir. 1999).

[16]*See United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

[17]*Southwestern Bell Telephone Co.,* 168 F.3d at 1350; *see Public Service Commission of Maryland, Memorandum Opinion and Order*, 4 F.C.C.R. 4000, 4005 & n.61 (1989), *aff'd*, 909 F.2d 1510 (D.C. Cir. 1990).

1. The Exercise of Ancillary Jurisdiction Over LEC Provision of CPP Billing and Collection Is Contrary to the Act

First, the exercise of ancillary jurisdiction by the FCC over LEC billing and collection is contrary to law — namely, it is contrary to Section 332 of the Act. Section 332(c)(3) was added by the Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act") and, among other things, preempts states from imposing rate or entry regulation on CMRS.[18] At the same time, however, Section 332(c)(3) expressly reserves to the states — not the Commission — the authority to regulate the "other terms and conditions of commercial mobile services."[19] In the House Report to the 1993 Budget Act, House Committee members clarified what they meant by the phrase "other terms and conditions:"

> By "terms and conditions," the Committee intends to include such matters as *customer billing information and practices and billing disputes and other consumer protection matters*; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority."[20]

The House Report also clarified that the list was intended to be illustrative only, and was not meant to preclude other matters.[21] In sum, Congress' created a system of dual regulation: while it gave the FCC jurisdiction over rate and entry regulation of commercial mobile services, it gave the states the right to regulate the terms and conditions of those services, including billing information and

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[18] *See* Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 393 (1993), *codified at* 47 U.S.C. § 332(c)(3).

[19] *See* 47 U.S.C. § 332(c)(3).

[20] *See* H.R. Rep. No. 103-111, at 261 (May 25, 1993) ("House Report") (emphasis added).

[21] *See id.*

practices and other consumer protection matters.[22] Accordingly, regulation of CMRS customer billing information and practices, billing disputes and other consumer protection matters lies squarely with the states.

In the case of CPP, the Commission has correctly concluded that CPP is a CMRS service subject to FCC regulation under Section 332.[23] Specifically, the *Declaratory Ruling* determined that CPP meets the statutory definition of CMRS prescribed by Section 332(d), finding CPP to be a "mobile service" that is offered "for profit" and is interconnected to the "public switched network."[24] In finding CPP to be CMRS, the Commission concluded that "[i]n agreeing to pay for the call to the CMRS subscriber, the calling party becomes, for the purpose of completing the call, a customer of the CMRS provider. . . . Thus, a CPP offering, while transferring some payment aspect of the call to a customer other than the owner of the mobile phone, does not in any fashion alter the regulatory classification of the call."[25] In short, the Commission has concluded that CPP is a CMRS service, and that calling parties become customers of the CPP CMRS provider for purposes of completion of the call.

Nevertheless, while CPP itself is a CMRS service option subject to the exclusive jurisdiction of the FCC, the provision of CPP also involves other terms and conditions — notably, how CMRS providers may bill and collect from the calling party. The question, then, is who has jurisdiction over the provision of billing and collection services necessary for CMRS providers to provide a CPP

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[22]*See id.; see also* 47 U.S.C. § 332(c)(3).

[23]*See Declaratory Ruling* at ¶¶ 7, 15, 16.

[24]*See Declaratory Ruling* at ¶¶ 15-16.

[25]*Declaratory Ruling* at ¶ 17.

service option. The legislative history of Section 332(c)(3) could not be clearer on this point: "customer billing information and practices and billing disputes and other consumer protection matters" fall within the jurisdiction of the states,[26] not the FCC. The reason for this is straightforward — Congress intended that while the FCC retain jurisdiction over CMRS service offerings, the states retain jurisdiction over consumer protection issues, including customer billing. Since calling parties become customers of CMRS providers,[27] states have the right to ensure that the interests of those customers are protected. How those calling parties will be billed and their monies collected is intimately related to protecting their interests, as Congress recognized.

In fact, the Commission has already come to the same conclusion in the *Arizona Decision*,[28] albeit in dicta. In the *Arizona Decision*, the Commission considered a petition by the Arizona Corporation Commission ("ACC") to retain state regulatory authority over the rates of intrastate CMRS and the entry of CMRS providers within Arizona. In the petition, however, ACC had argued that its intervention into a matter concerning CPP "customer billing" was evidence of the continued need for state rate regulation of CMRS.[29] Although the Commission denied the petition, the

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[26]*See* House Report at 265; *see also* 47 C.F.R. § 332(c)(3).

[27]*Declaratory Ruling* at ¶ 17.

[28]*Petition of Arizona Corporation Commission to Extend State Authority over Rate and Entry Regulation of All Commercial Mobile Radio Services and Implementation of Sections 3(n) and 332 of the communications Act*, PR Docket No. 94-104 and GN Docket No. 93-252, *Report and Order and Order on Reconsideration*, 10 F.C.C.R. 7824 (1995) (*Arizona Decision*).

[29]Petition of Arizona Corporation Commission to Extend State Authority over Rate and Entry Regulation of All Commercial Mobile Radio Services in GN Docket No. 94-104 at 14 (filed Aug. 9, 1994).

Commission concluded that CPP-related billing practices fall within the "other terms and conditions" subject to state regulation, stating:

> Under the Communications Act, however, billing practices are considered "other terms and conditions" of CMRS offerings, not rates, and the ACC retains authority to regulate such practices. Regulatory activity concerning such practices is not justification for continued rate regulation authority."[30]

In so holding, the Commission was addressing only the issue of jurisdiction over "other terms and conditions," and not the broader jurisdictional status of CPP service offerings as a whole, as the Commission notes in its *Declaratory Ruling*.[31]

Accordingly, based on Congress' express reservation of jurisdiction over customer billing and consumer protection issues to the states under the "other terms and conditions" language in Section 332(c)(3), any attempt by the FCC to mandate or otherwise impose restrictions upon the provision of billing and collection for CMRS CPP services is contrary to Section 332(c)(3). As a result, the FCC's proposal to use ancillary jurisdiction under Title I to regulate LEC billing and collection is contrary to law and must be rejected.

2. Even Assuming the Availability of Ancillary Jurisdiction, It Is Not "Necessary" to Exercise Such Jurisdiction, and Doing So Would Be Contrary to the Public Interest

Commission regulation of LEC billing and collection services for unaffiliated third party CMRS providers also fails the second half of the ancillary jurisdiction test — whether the exercise of jurisdiction is *necessary* for the achievement of the goals of the Communications Act. As shown

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[30] *Arizona Decision*, 10 F.C.C.R. at 7837.

[31] *See Declaratory Ruling* at ¶¶ 18-19. The *Declaratory Ruling* stated that to the extent the *Arizona Decision* can be interpreted as holding that CPP is not a CMRS service, that holding is overruled. *Id.* at ¶ 19.

below, given the evolution of the marketplace, it is wholly unnecessary for the Commission to adopt new regulations to facilitate CPP, particularly by attempting to re-regulate LEC billing and collection, which the Commission previously detariffed with regard to third parties in 1986,[32] or otherwise imposing billing and collection mandates. Rather, the Commission should continue to rely upon the competitive marketplace.[33]

(a) Nothing Is "Broken," So There Is No Need for Regulatory Intervention; The Commission Should Leave Billing and Collection Issues to the Competitive Marketplace

First, there is no compelling basis to exercise ancillary jurisdiction and mandate the provision of billing and collection because nothing is "broken;" therefore, there is no need for regulatory intervention. According to an analyst with the Yankee Group, "Telling subscribers to start billing charges to the people placing calls would be the equivalent of fixing what isn't broken."[34] He continues, "'We just don't anticipate that it's going to have the hoped for-impact,'" given the fact that "'prices have come down so much in the last few years, it's taken the wind out of calling party pays' sails.'"[35]

What the analyst is referring to is the product of the deregulated competitive marketplace. As competition has continued to expand at a rapid pace, prices for wireless phone use have fallen

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[32]*See Detariffing of Billing and Collection Services*, CC Docket 85-88, *Report and Order*, 102 FCC 2d 1150, 1170-71 (1986) (*1986 Detariffing Decision*), *recon. denied*, 1 F.C.C.R. 445 (1986).

[33]*See, e.g.*, Aliant Comments to NOI at 2-3; BellSouth Comments to NOI at 2; SBC Comments to NOI at 7.

[34]*Caller Pays Proposal Prompts Concerns*, Mobile Phone News, Vol. 17, No. 4, June 14, 1999 (describing comments of David Berndt, an analyst with the Yankee Group).

[35]*Id.*

and service plans have developed to meet customer needs, which have combined to reduce the demand for a CPP-type service. For example, according to the *CMRS Fourth Report* on the state of competition in the CMRS marketplace, "the mobile telephony sector of the market experienced another year of strong growth and competitive development," and "because of growing competition in the marketplace, it appears that the average price of mobile telephone service has fallen substantially during the year since the *Third Report*, continuing the trend of the last several years."[36] The *Fourth Report* also touts the success of one rate plans, which offer customers large numbers of minutes-of-use ("MOUs) at one low rate:

> One of the goals operators hoped to achieve by offering customers price plans with large bundles of low price MOUs was to encourage increased overall usage of wireless services. . . . Partly due to overall price decreases as well as the increasing adoption of digital services, average MOUs for the industry are increasing. According to one analyst, average MOUs reached 143 per month per subscriber in 1998, *an increase of 43 percent* from 1996.[37]

Increasing minutes of wireless use is one of the Commission's fundamental reasons for initiating the CPP rulemaking.[38] What the *Fourth Report* reveals, however, is that there is no need for CPP to increase MOUs; the competitive market is having that effect on its own, in the absence of regulatory intervention.

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[36]*See Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Fourth Report*, FCC 99-136, at 6-7 (rel. June 24, 1999) (*CMRS Fourth Report*).

[37]*See CMRS Fourth Report* at 25 (emphasis added).

[38]*Notice* at ¶20 ("The Commission is initiating this Notice of Proposed Rulemaking for two fundamental reasons. First, the availability of CPP as a service offering for wireless telephone subscribers has the potential to expand wireless market penetration *and minutes of use* and, in so doing, offers an opportunity to provide a near-term competitive alternative to incumbent local exchange carriers (LECs) for residential customers.") (emphasis added).

One recent highly publicized market test by AT&T Wireless bears this out. In April 1998, AT&T launched a new free CPP service to existing and new wireless subscribers in Minnesota, whereby the calling party paid a flat rate of 39 cents per minute (without roamer or long distance fees) when calling an AT&T participating customer who subscribed to a special number having a "500" area code. At the time, the service was described by one telecommunications analyst as "insanely clever," and was expected to boost AT&T Wireless' subscribership and airtime.[39] The results, however, were disappointing. AT&T found that CPP was held back by the growth of its Digital One-Rate plan, which offers subscribers "baskets" of pre-set minutes of use, because customers no longer cared how many people called them. According to an AT&T Wireless spokesperson, "'Digital One Rate blew the [Minnesota] test right out of the water."[40]

In addition, BellSouth and many other wireless carriers have implemented several new calling features to stimulate demand for incoming calls, such as first incoming minute free and caller identification. One carrier, American Personal Communications, has even reported that the use of first incoming minute free has resulted in a "much more balanced [incoming/outgoing] traffic flow . . . than on the traditional cellular networks. . . . approaching 50-50."[41] Most other carriers similarly agree that the feature has boosted the number of incoming calls, and there appears to be a consensus

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[39]*See* Edward Warner, *AT&T Launches New Caller Pays Service*, Wireless Week, April 13, 1998.

[40]*See* Edward Warner, *The Rocky Road to CPP*, Wireless Week, June 28, 1999 (quoting Paula McWilliams, AT&T Wireless spokesperson).

[41]*See CTIA Preparing White Paper to Raise Awareness of Calling Party Pays*, PCS Week, Vol. 8, No. 17 (Apr. 23, 1997).

that "first minute free fits together with free voice mail and Caller ID to make subscribers more comfortable leaving their phones on and taking calls."[42]

Given all of these factors — a highly competitive marketplace characterized by declining prices and rising MOUs, and the advent of innovative calling features like one rate plans and "first-minute free" options — CPP is unlikely to significantly add to the already growing penetration of wireless service, and thus is unlikely to markedly impact wireless/wireline competition. Instead, the growing availability of wireless service as a competitive alternative to wireline service will continue regardless of the widespread availability of CPP.

As noted in the *CMRS Fourth Report,* 1998 saw the largest increase in wireless subscriber penetration to date, increasing from 55.3 million subscribers to 69.2 million subscribers over a 12 month period,[43] despite the *absence* of widely-available CPP offerings by CMRS carriers. At most, then, CPP will be a niche CMRS service. As one veteran observer notes, "'CPP is an idea whose time came five years ago,' before the advent of bare knuckles competition engendered by the entry of PCS operators."[44]

Accordingly, given the way the market has evolved, the time for creating and implementing regulations for CPP has passed. As a result, it is unnecessary for the Commission to adopt new

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[42]*See Industry, Analysts Debate Pros and Cons of Incoming First Minute Free*, PCS Week, Vol. 8, No. 33 (Aug. 13, 1997).

[43]*See CMRS Fourth Report* at 8.

[44]*FCC's Calling Party Pays Rulemaking Stresses Optional Nature*, Wireless Today, Vol. 3, No. 111, June 10, 1999 (quoting Mark Lowenstein, senior vice-president with the Yankee Group); *see also Caller Party Pays Concept Prompts Concerns*, Mobile Phone news, Vol. 17, No. 24, June 14, 1999 ("I don't really see a huge boom with calling party pays.") (quoting Kent Olson, director of wireless research for the Strategis Group).

regulations to facilitate CPP, such as the re-regulation of LEC billing and collection (which was detariffed with regard to third parties in 1986),[45] or to impose billing and collection mandates. Instead, the Commission should continue to let the market operate.[46] The decision to offer CPP should be a business decision, based upon the dictates of the competitive market.

If the marketplace changes and demand develops for CPP, BellSouth will work with other providers to develop arrangements to meet that demand. Such arrangements should be conducted on a voluntary basis, however, and not pursuant to Commission mandates. For example, LECs and IXCs currently enter into contracts to address billing and collection issues. LECs and CMRS carriers should likewise be allowed to enter into contracts for CPP on the same voluntarily negotiated basis. BellSouth has indicated its willingness to negotiate such contracts at mutually agreeable terms.

(b) Cost-Effective and Technically Advanced Competitive Alternatives to LEC Billing and Collection Exist Today

The Commission states that it is "particularly interested in the availability of alternative methods of CPP-related billing and collection and in the most recent relevant technological developments."[47] As discussed below, the immediate availability of alternate methods which allow CPP billing and collection to be conducted by the CMRS carrier providing CPP demonstrate that it is clearly not necessary for the Commission to re-regulate LEC billing and collection. Specifically, as of October 1998, nearly 10 months ago, the trade press was already reporting the existence of at

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[45] *See 1986 Detariffing Decision*, 102 FCC 2d at 1170-71.

[46] *See, e.g.,* Aliant Comments to NOI at 2-3; BellSouth Comments to NOI at 2; SBC Comments to NOI at 7.

[47] *See Notice* at ¶ 55.

least two products designed to allow wireless carriers to control CPP billing and collection.[48] Those products — AG Communication Systems' INgage CPP and Nortel's Service Builder — offer CMRS carriers cost-effective network-based alternatives to the LEC billing approach.

For example, INgage CPP is marketed as a "network-based Calling Party Pays (CPP) solution that gives wireless carriers control over the cost of the service as well as the billing process."[49] The "cost-effective" INgage service "takes care of all administration from advising callers of airtime charges to tracking elapsed call time and generating a record." According to a spokesperson for INgage, "'One main difference between the LEC-based CPP and AG's INgage is that the LEC catches the call at the front of the network. INgage grabs the call at the home MSC (wireless switch), thus allowing control by the CPP application. *This tools the application for the wireless carrier, rather than expecting the LEC or other carrier to assume application costs for CPP functionality.*'"[50] Nortel's Service Builder operates in a similar manner. [51]Another INgage advertisement puts it more bluntly: "Now [wireless carriers] *have a choice*: AG Communication Systems' INgage Calling Party Pays puts you in control."[52]

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[48]*See* Frank Slavick, *Calling Party Pays: Fact or Fiction*, Billing World, October, 1998.

[49]*See* Press Release, *AG Communication Systems' INgage® Calling Party Pays Gives Wireless Telephone Companies Control of Billing, Administration*, Feb. 23, 1998, *available at* <<http://www.acgs.com/pressrel/ingage/cpp.htm>>.

[50]*See* Frank Slavick, *Calling Party Pays: Fact or Fiction*, Billing World, October, 1998 (emphasis added) (quoting Ajit Sadarangani, Senior Product Planning Manager for INgage).

[51]*See id.*

[52]*See* Advertisement, Calling Party Pays Doesn't have to Cost Wireless Carriers a Limb (emphasis added), *published in* Wireless Week, Mar. 30, 1998, at 13.

Once two-way communication is complete using the INgage service, for example, information about the call (a "Call Detail Record," or "CDR") is downloaded to a billing platform for processing and collection by the appropriate wireless carrier or clearinghouse.[53] One such clearinghouse, Illuminet, has provided billing and collection services since the mid-1980s to LECs, and has indicated in its *NOI* comments in this proceeding that the underlying processing and settlement capabilities exist *today* to provide CPP clearing services to wireless carriers.[54]

INgage CPP ands Nortel's Service Builder are but two options which exist as alternatives to LEC billing and collection for CPP. If market demand develops for CPP, others are sure to follow. What is clear, however, is that it is not necessary for the Commission to regulate LEC billing and collection services for CPP in order to ensure that CPP can be offered effectively on a nationwide basis. In fact, the contrary may be true. As one commentator noted, "[g]iven the diverse number of carriers in the United States, in differing vertical segments, CPP stands little chance of becoming ubiquitous on a national level using the LEC-based approach."[55] Instead, "[t]he CPP of tomorrow will likely be controlled *by the wireless carrier* with wireless intelligent network (WIN) deployed," such as INgage CPP and Nortel's Service Builder.[56]

Accordingly, given the ready availability of cost-effective and technologically advanced alternatives to ILEC billing and collection services for CPP, the Commission should decline to

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[53]*See* Frank Slavick, *Calling Party Pays: Fact or Fiction*, Billing World, October, 1998.

[54]*See id.;* Illuminet Comments to NOI at 5.

[55]Frank Slavick, *Calling Party Pays: Fact or Fiction*, Billing World, October, 1998.

[56]*Id.* (emphasis added).

require CPP-related LEC billing and collection. Mandatory LEC billing and collection is not necessary for the nationwide offering of CPP and, in fact, may harm it.

3. The Exercise of Ancillary Jurisdiction to Regulate LEC Billing and Collection Is Contrary to Precedent

The exercise of ancillary jurisdiction to regulate LEC provision of billing and collection for unaffiliated third party CMRS providers is also contrary to Commission precedent where it has declined to exercise ancillary jurisdiction over LEC billing and collection. Specifically, in 1986, the Commission detariffed billing and collection services provided by LECs to unaffiliated interexchange carriers ("IXCs"), finding the regulation of such services to be unnecessary.[57] In the *1986 Detariffing Decision*, the Commission found that there was sufficient competition to allow market forces to respond to excessive rates or unreasonable billing and collection practices on the part of LECs:

> Although we cannot quantify the market shares of the various billing and collection vendors, the record clearly indicates that significant competition exists and will continue to develop. It is important to recognize that competition is defined not only by credit card companies, collection agencies, service bureaus and the LECs, but by the customers ([IXCs]) themselves. To the extent that [IXCs] are able to meet their own billing and collection needs, the market acts on the LEC in much the same way as competition from other third party billing vendors does. In either case, the effect is to put downward pressure on LEC rates.[58]

As noted above, these same competitive pressures exist in the case of CMRS CPP. Competition does exist now — INgage CPP and Nortel's Service Provider are but two examples which allow

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[57] *See 1986 Detariffing Decision*, 102 FCC 2d at 1170-71.

[58] *Id.* at 1170.

CMRS providers to directly manage billing and collection — and further competition in the forms of credit card companies and service bureaus are expected to develop.[59]

The *1986 Detariffing Decision* also found that "there are no barriers to entry in the billing and collection market" and that "the capital costs are relatively low inasmuch as billing and collection is an expense oriented service."[60] There has been no showing as to why these same findings are not also applicable in the case of CMRS CPP. The Commission should apply this same logic and decline to regulate the provision of CPP billing and collection services by LECs to unaffiliated third party CMRS providers.

More recently, the Commission reaffirmed its decision to deregulate LEC billing and collection when it declined to require the Bell Operating Companies ("BOCs") to provide billing and collection services to enhanced service providers ("ESPs").[61] The Commission noted that "[t]he parties recognize that we have largely deregulated these competitive services, and we see no need to reregulate them."[62] On reconsideration, the Commission emphasized that, as is the case with CMRS CPP providers, ESPs are able to bill their own subscribers "without our mandating that BOCs

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[59]*See, e.g.*, AT&T Wireless Comments to NOI at 2-3; BellSouth Reply Comments to CTIA Petition at 6.

[60]*1986 Detariffing Decision*, 102 FCC 2d at 1171.

[61]*See Filing and Review of Open Network Architecture Plans*, 4 F.C.C.R. 1 (1988) *(BOC ONA Order)*, *recon.*, 5 F.C.C.R. 3084 (1990) (*BOC ONA Reconsideration Order*); 5 F.C.C.R. 3103 (1990) (*BOC ONA Amendment Order*), *erratum*, 5 F.C.C.R. 4045 (1990), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993), *recon.*, 8 F.C.C.R. 97 (1993) *(BOC ONA Amendment Reconsideration Order)*; 6 F.C.C.R. 7646 (1991) *(BOC ONA Further Amendment Order)*; 8 F.C.C.R. 2606 (1993) (*BOC ONA Second Further Amendment Order*), *pet. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993).

[62]*BOC ONA Order*, 4 F.C.C.R. at ¶ 109.

perform such services for them."[63] More importantly, the Commission placed the burden of proof on those parties seeking to re-regulate BOC billing and collection to demonstrate that market conditions *required* that such services be provided by the BOCs, and found that they had not met their burden.[64] The Commission also concluded that it was premature to mandate the provision of any billing information services.[65]

The Commission should adopt the same conclusions with regard to CPP. As the Commission noted in the enhanced services proceeding, should problems arise, it retains jurisdiction to reconsider any decision not to re-regulate billing and collection, and its complaint process is available to address problems on an individualized, fact-specific basis.[66]

C. Given Unresolved Technical Issues, the Costs of Mandated LEC Billing and Collection for CPP Are Not Fully Quantifiable

At this point, CPP is in a state of flux — there are no finalized industry standards, and no consensus on how it is to be provided. Moreover, questions of leakage management, customer initiated blocking, consumer education, notification and protection, and the impact upon other regulatory initiatives (such as number portability and truth-in-billing) have yet to be resolved. As a result, it is impossible at this point to fully quantify the potential costs of implementing CPP. Nevertheless, any mandated LEC billing and collection requirement could impose significant and unjustified costs on LECs.

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[63] *BOC ONA Reconsideration Order,* 5 F.C.C.R. at ¶ 33.

[64] *Id.*

[65] *Id.*

[66] *See BOC ONA Order,* 4 F.C.C.R. at ¶ 107 & n.200.

As just one example, providing CPP billing and collection services will require LECs to upgrade software and hardware involved in their billing systems. As BellSouth pointed out in its truth-in-billing comments, the cost of modifying these systems is enormous — the redesign or insertion of a single page can cost as much as $500,000 to $1,000,000.[67] The ultimate costs can be effected by such seemingly insignificant mandates as the requirement to provide the logo of the CPP provider on the LEC ratepayer's bill. Moreover, the rate structure for CPP, and the information to be included in the bill, is likely to differ significantly from that involved in IXC billing, requiring substantial redevelopment expenditures.[68]

If LECs are required to provide billing and collection upon demand, they will be forced to undertake such investments before a request for this service is ever received. If no CMRS provider asks for this, the LEC would have to recover the cost of preparing for the unwanted billing service from its wireline ratepayers, who receive no benefit from the expenditure.

These costs cannot be justified. There is no compelling record that CPP is so necessary — and LEC involvement so critical — that LECs should be required to provide billing and collection services, which are otherwise available in the competitive market, at, or below, cost. Nor has there has been any showing that CPP rises to the level of E-911, universal service, or number portability in the highly competitive CMRS marketplace. BellSouth strongly opposes any additional unfunded mandates, particularly when there is no compelling public interest reason for doing so.

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[67]*See* BellSouth Comments in CC Docket No. 98-170 at 15 (Nov. 13, 1998).

[68]For example, CPP may involve roaming charges and intersystem transport charges in addition to a per-minute rate.

II. IN THE ABSENCE OF ANY EVIDENCE TO SUGGEST CPP PRICING WILL BE PROBLEMATIC, THE COMMISSION SHOULD DEFER REGULATORY INTERVENTION

The *Notice* also seeks comment on whether regulatory intervention is necessary to protect a calling party against excessive rates charged by a CMRS carrier to complete a CPP call.[69] At this point, any regulatory intervention is premature, given the fact that "there is no evidence to suggest that CPP pricing will in fact be problematic if CPP is implemented on an extensive basis in the United States."[70] As a general matter, the Commission has never regulated the rates of CMRS carriers, because the competitive marketplace allows consumers to choose between multiple carriers and their competing rates.

In the case of CPP, the competitive market will likewise exert control, albeit indirect control, on CPP rates. For example, a CMRS subscriber to CPP service can elect to change carriers to achieve better rates for incoming calls, or can elect to terminate the CPP option. Moreover, it is unlikely that CMRS subscribers would sign up for a service subjecting their callers to excessive rates that they believe might dissuade them from completing the call,[71] unless that was the CMRS subscriber's goal. Accordingly, the Commission should allow the market to work in the absence of

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[69] *Notice* at ¶¶ 53-54.

[70] *Id.* at ¶ 54.

[71] The Commission must recognize, however, that many callers may deem *any* rates excessive to place a call to a mobile user that up until now they did not have to pay for *at all*. This is one of the inherent problems with the CPP concept, and one that the market — not the Commission — must address. For despite the fact that many wireless subscribers may like the CPP concept, many calling parties may choose not to complete a call to a CPP subscriber, regardless of whether the rates are high or low, simply because they do not want to pay for the call at all. This may discourage CMRS subscribers from electing the CPP service in the long run, particularly as CMRS rates continue to fall and more CMRS subscribers take advantage of one-rate billing plans. *See* discussion *supra* Section I.B.2.a.

evidence that CMRS carriers will charge anticompetitive rates for CPP service. BellSouth thus supports the Commission's tentative conclusion to "defer regulatory intervention until there is clear evidence that Commission action is necessary to resolve rate issues."[72]

III. THE COMMISSION OVERSTATES THE POTENTIAL BENEFITS OF CPP, AND PLACES UNDUE RELIANCE UPON THE INTERNATIONAL MODEL

BellSouth believes that the Commission's *Notice* may have overstated some of the potential benefits of CPP. For example, the *Notice* notes that CPP could be the catalyst needed to create significant wireless usage by U.S. subscribers.[73] What the *Notice* downplays, however, is the fact that wireline customers, who already express frustration at the amount of fees and charges on their bills, may balk at the idea of having to pay an additional cost to reach a mobile user.[74] In fact, only 19 percent of those members of the general public surveyed in a recent Yankee Group study indicated that they would be willing to pay for calls to a wireless phone or pager.[75] Thus, as many as four out of five callers from wireline phones who formerly felt free to call mobiles may now

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[72]*Notice* at ¶ 54.

[73]*See Notice* at ¶ 23.

[74]*See* Grant Buckler, *Future of Calling Party Pays in Doubt, Say Researchers*, Newsbytes, June 11, 1999 (reporting the comments of one analyst who predicted that "having to pay for calls would deter some callers from completing calls to wireless phones").

[75]*See* Yankee Group, 1998 Mobile User Survey. Conversely, 34% indicated that they are not very willing to pay for calls to a mobile phone, and 43% indicated that they are not willing to pay *at all* for such calls. The remaining 4% of respondents indicated they did not know whether or not they would be willing to pay for calls to mobiles. *See id.*

become reluctant to do so except in emergency situations, thus making wireless service *less* attractive.[76] Even Commissioner Ness has indicated that this is a concern:

> Today, most telephone service is unmetered; no additional charges are imposed for calls to local numbers. . . . How will wireline customers react if they cannot complete a local call to a wireless customer except by agreeing to pay an additional charge.[77]

BellSouth submits that the Yankee Group data demonstrates that the Commission should expect a backlash among the majority of wireline callers who may be asked to pay this additional charge to complete a CPP call, and that the result could thus be a decrease, not an increase, in wireless phone usage.

The *Notice* also advocates that CPP may make wireless usage particularly attractive to low-income and low-volume wireless consumers.[78] The Commission ignores, however, the impact of CPP upon low-volume and low-income *wireline* consumers who may not be able to afford additional charges to complete calls to CPP customers above and beyond their already discounted local phone service charges. Are those callers going to have the money and/or desire to now pay to call a mobile phone? One analyst has expressed concern that CPP could "give carriers in the United States a black eye" because "wealthy wireless subscribers might be perceived as leaving others to pay their phone bills."[79] Moreover, although prices of wireless phones and services have been declining in recent

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[76]*See Notice* at ¶43 (recognizing that in some cases the calling party would not complete the call in any case, regardless of the rates charged for the CPP service).

[77]*Caller Party Pays Proposal Prompts Concerns*, Mobile Phone News, Vol. 17, No. 24 (June 14, 1999) (quoting Commissioner Susan Ness).

[78]*See Notice* at ¶ 3.

[79]*See* Edward Warner, *The Rocky Road to CPP*, Wireless Week, June 28, 1999 (citing Elliott Hamilton, director of U.S. telecommunications consulting at the Strategis Group).

years, proportionally more low income and low volume users rely upon landline phones than wireless phones; thus, CPP would actually be placing a greater burden on the very disadvantaged group the Commission is targeting, by preventing them from placing and completing calls that they can make for free today, which is clearly contrary to the public interest.

In addition, the *Notice* contemplates CPP will encourage people to leave their phones on longer because they will not worry about the cost of incoming calls.[80] This dismisses the fact, however, that many users do not leave their phones on regularly because of a desire to conserve limited battery life, or specifically do not want to be disturbed or receive calls at all times of the day. For example, the Yankee Group reports that battery life is the number one cited problem for wireless users.[81] Thus, limited battery life is a deterrent to keeping a wireless phone "on" at all times. This is a device-related issue that is unrelated to the availability, or lack thereof, of CPP. Limited battery life is especially a concern for the many low income or low volume owners of older or cheaper phones — those users the Commission is specifically targeting in this proceeding — whose phones have an even more limited battery life, and would thus be more likely to keep their phones "off" to conserve battery life, regardless of CPP.

Finally, the Commission continues to place undue reliance upon the international success of CPP in Europe and Latin America. Although the Commission recognizes that it has "no data regarding increased usage of CPP subscribers in the United States," it relies upon international

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[80] *See Notice* at ¶23.

[81] *See* Yankee Group, *Mobile User Survey Series, Cellular and PCS Service Strategies*, Wireless/Mobile Communications North America Report, Vol. 6, No. 17, at 10-11, June 1998.

models to support dramatic usage increases once CPP is implemented.[82] While BellSouth provides CPP successfully internationally, comparisons to the international CPP models are misleading, due to several factors. First, most foreign customers pay for metered landline calls based upon minutes of use, so paying for wireless airtime calls on the same basis is normal and customary. Second, wireless rates in many countries are higher than those in the United States. Third, international markets generally have fewer carriers, and are less competitive, than the domestic market. And Fourth, most U.S. markets lack dedicated wireless numbers which exist in other countries to signal that a caller would pay for the call under the CPP billing structure.[83] Accordingly, as BellSouth has previously shown, reliance on international model is misplaced.[84]

CONCLUSION

Given the competitive market and the variety of service options available, CPP is likely to be a niche service, at most. As a result, there is no justification for the imposition of regulatory mandates concerning CPP, and the Commission should continue to let the market operate. In particular, the Commission should decline to mandate the provision of LEC billing and collection for CMRS CPP services. As shown herein, LEC mandated billing and collection for CPP is unnecessary, and there is no legal or policy basis upon which to predicate re-regulating LEC billing and collection in the context of CPP. In fact, doing so could impose substantial costs on LECs and their ratepayers, which is contrary to the public interest. Moreover, the Commission should defer

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[82] *See Notice* at ¶ 24.

[83] *See* Edward Warner, *The Rocky Road to CPP*, Wireless Week, June 28, 1999; *Caller Party Pays Proposal Prompts Concerns*, Mobile Phone News, Vol. 17, No. 24, June 14, 1999; Catherine A. Olsen, *CPP Lost Appeal*, Wireless Review, Aug. 1, 1999.

[84] *See* BellSouth Comments to NOI at 6-7; BellSouth Reply to NOI at 4.

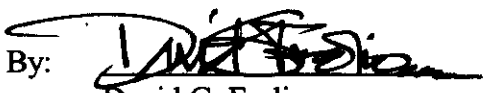
CPP rate regulation, given the absence of any evidence to suggest CPP pricing will be anticompetitive. Finally, the Commission should avoid placing undue reliance upon the international model to justify CPP regulatory intervention in the United States, given the differing regulatory environment that characterizes foreign markets.

Respectfully submitted,

BELLSOUTH CORPORATION

By: 

William B. Barfield
Jim O. Llewellyn
1155 Peachtree Street, NE, Suite 1800
Atlanta, GA 30309
(404) 249-4445

By: 

David G. Frolio
1133 21st Street, NW, Suite 900
Washington, DC 20036
(202) 463-4182

Its Attorneys

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